SUPREME COURT, U. S.
FILED
JAN 28 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-545

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S MEMORANDUM IN REPLY

MAMBER, GOPMAN, EPSTEIN & FOOSANER
Counsel for Petitioner
16870 N.E. 19th Avenue
North Miami Beach, Florida 33162
Telephone: (305) 947-4521
THOMAS J. PILACEK

MIAMI REVIEW — 371-4853 — 377-3721

in the
Supreme Court
of the
United States

OCTOBER TERM, 1974

NO. 74-545

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S MEMORANDUM IN REPLY

The Board opposes the Petition on the procedural ground that both points raised in the Petition are foreclosed from review by this Court, because Petitioner's exceptions to the Law Judge's Decision did not specifically

challenge the backpay award and because the issues were not argued in the Court below. (Mem., p. 4) The Board is simply incorrect in its assertion that certiorari should be denied on these bases.

I. Exception No. 4[1] disputes the Law Judge's failure to integrate Title VII provisions with the provisions of the Act. Point II of the Petition goes to that very problem: that the *Mansion House* decision,[2] which declared that judicial enforcement of racial policies prohibited by Title VII is proscribed by the due process clause of the Fifth Amendment, conflicts in principle with the instant case because Title VII provisions were not integrated with the Act in determining the backpay award to Wilson. As Petitioner subsequently argued to the Court of Appeals:

> "like in *Mansion House*, the order in this case perpetuates race discrimination by running in favor of an employer who selected a representative who practiced race discrimination in the performance of his supervisory functions. In addition, the make-whole remedy in this case (ALJ 11, A.473; D&O 2-3, A.479-80) runs squarely in favor of Wilson, the person alleged to have perpetrated the discriminatory job conditions upon the laborers."[3]
>
> * * *
>
> "The Board's cross-application for enforcement of the instant order is a request that this Court

[1]Appendix to briefs for use in the Court of Appeals, Volume II, pp. 475-6.

[2]*NLRB v. Mansion House Center Mgt. Corp.*, 473 F.2d 471 (CA8, 1973), relied on by Petitioner in the Court of Appeals.

[3]Petitioner's reply brief, p. 7.

> unconstitutionally perpetuate race discrimination and, in fact, reward the discriminatory supervisor. That request should not be granted."[4]

The issue before this Court in Point II was thus properly preserved by exception and argued to the Court below, contrary to the Board's assertion.

II. The precise issue raised in Point I[5] of the Petition was, as the Board correctly states, neither specifically preserved by exception on the precise ground presented nor argued to the lower court on that basis. But it did not have to be.

The Ninth Circuit specifically noted in connection with the issue raised in Point I:

> "We have not found one case or Board decision in which a supervisor was awarded backpay as the result of an 8(b)(1)(B) violation." *Silver Bay*, 498 F.2d at 29

It therefore cannot be denied that the decision below, silent as it is on the backpay issue, does violence to the more than twenty-five years of experience under the Act.

Although the court in *Silver Bay* specifically refrained from ruling that the Board exceeded its statutory author-

---

[4]id., p. 17.

[5]That the Board exceeded its statutory authority in the backpay award, pursuant to *National Labor Relations Board v. Silver Bay Local Union 962, International Brotherhood of Pulp, Sulphite & Paper Mill Workers*, 498 F.2d 26 (CA9, 1971).

ity in the backpay award there, we submit that that result is inescapable in view of the express statutory provisions relied on in the instant Petition. And this Court has ruled that exceptions are not necessary in cases where the Board has "patently traveled outside the orbit of its authority." *NLRB v. Cheney California Lumber Company*, 327 U.S. 385, 388.

Secondly, the purpose of the exceptions was to seek to overturn the violation found by the Law Judge. Had Petitioner been completely successful in this endeavor, the backpay award would necessarily have fallen with it. Under such circumstances a specific challenge to the backpay award would have been a useless redundancy.

In this regard we point out that the violation found by the Law Judge consisted of Petitioner's causing Wilson's discharge,[6] whereas that found by the Court of Appeals consisted of causing Davis' reappointment:

> "The Board held that the union, by *insisting upon the reappointment of Davis*, violated . . . Section 8(b)(1)(B) of the . . . Act." (Pet., App. 4)

Under this finding the backpay award should have fallen *a fortiori*, upon the challenge raised in the Court of Appeals.

---

[6] Appendix to Appellate Briefs, Volume II, page 10:
"Having found that the Respondent restrained and coerced the supervisor *to discharge L. R. Wilson* . . . I shall further recommend that the Respondent make Wilson whole for any loss of earnings he may have suffered . . . ."

Finally, the Court has jurisdiction to determine novel issues of importance which involve construction of statutes. *American Federation of Musicians v. Wittstein*, 379 U.S. 171, particularly where the ruling below does violence to a well-established construction of the statutes by the administrative agents charged with its enforcement. *Patterson v. Lamb*, 329 U.S. 539.

Under the above principles, we submit that review is warranted where only two cases since the Act was enacted have permitted backpay awards to supervisors discharged as the result of a §8(b)(1)(B) violation. It is particularly appropriate where one of those cases, *Silver Bay*, struck down the award.

CONCLUSION

For the above reasons, and those presented in the Petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

THOMAS J. PILACEK
Counsel for Petitioner

January, 1975